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# Supreme Court Of The United States

October Term, 1974

No. 74-1123

**BOARD OF EDUCATION OF LOUISVILLE, KENTUCKY
DR. NEWMAN WALKER, SUPERINTENDENT - - - - -Petitioners**

*versus*

**JOHN E. HAYCRAFT
HAZEL K. LANE
LYMAN JOHNSON
RICHARD MILLER
BARBARA BYRD
AARON HOWARD
JOHN R. HUGHES
TERESA BLACK
JOHN SCHMIDT
EARL ALLUISI
AMERICAN FEDERATION OF TEACHERS - - - - - Respondents**

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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OF TEACHERS — *Respondents*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on December 11, 1974.

## CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit has not been published but is contained in the Appendix of this petition (pp. 87a). The memorandum opinion and judgment of the United States District Court has not been published but is contained in the Appendix of this petition (pp. 1a).

## JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered December 11th, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV

> " . . . nor shall any State deprive any person of life, liberty or property, without due process of law . . ."

United States Constitution, Amendment XIV

> " . . . nor deny to any person within its jurisdiction the equal protection of the law."

## QUESTIONS PRESENTED

1. Where a United States District Court, in a school desegregation case, found that the Board of Education of Louisville, Kentucky, converted the school system from a dual system to a unitary system within two years from this Court's decision in *Brown* v. *Board of Education of Topeka, Kansas*, 347 U.S. 483, 74 S.Ct. 686, 98 L.

Ed. 873, 38 A.L.R.2d 1180, and that changing housing patterns and other factors beyond the Board's power to control or remedy caused a racial imbalance in many of its schools, and where there was no claim of invidious discrimination or any discrimination on the part of the Board of Education of Louisville, Kentucky, does the fact that schools within the Louisville Independent School District were lawfully segregated in 1954 permit a finding by a United States Court of Appeals that the Board of Education of Louisville, Kentucky, is maintaining and operating a dual school system?

2. Where a United States District Court in a school desegration case found that the Board of Education of Louisville, Kentucky, did and has done all it could, short of cross-transportation or bussing, to racially balance the schools within its jurisdiction, and where it was found that cross-transportation or bussing within the Louisville system alone would accelerate the flight of the whites to the suburbs and elsewhere, thus resulting in the district become blacker and poorer, and where on appeal the United States Court of Appeals for the Sixth Circuit recognized this fact but did not expressly order desegregation on a countrywide basis or on a metropolitan basis, does such a decision comport with the previous school desegregation opinions of the United States Supreme Court, including and since *Brown* v. *Topeka, Kansas*, 347 U.S. 483, 74 S.Ct. 686, 98 L. Ed. 873, 38 A.L.R.2d 1180?

3. Does the opinion and judgment of the United States Court of Appeals in *Newburg Area Council* v. *Board of Education* (App. 87a) comport with this Court's order of remand and to reconsider this case in light of *Milliken* v. *Bradley*, 41 L. Ed. 2d 1069?

## STATEMENT OF THE CASE

This is a school desegregation case brought by the respondents against the petitioners, Board of Education of Louisville, Kentucky, and Dr. Newman Walker, its superintendent. The trial of this case took place in Louisville, Kentucky, before the Hon. James Gordon, United States District Judge for the Western District of Kentucky. The case was tried December 1-7, 1972 (1a), and after hearing voluminous testimony and considering more than 130 exhibits, the District Court made complete findings and on March 8, 1973, rendered a judgment to the effect that the Board of Education of Louisville, Kentucky, and its superintendent, had desegregated the Louisville School System and are now operating a unitary school district (35a).

In the same litigation, the Board of Education of Jefferson County, Kentucky, and its superintendent, were sued and the same relief was demanded. The United States District Court made similar findings and entered a similar judgment relative to the Jefferson County School District (36a).

This petition relates only to the claims by the Board of Education of Louisville, Kentucky, and its superintendent. The Board of Education of Jefferson County, Kentucky, authorized its counsel to prepare and file with this Court a petition for Certiorari (99a).

Before the Supreme Court's decision in *Brown* v. *Board of Education of Topeka, Kansas (Brown I)* and pursuant to state law, all schools within Kentucky were segregated. After *Brown I* petitioners put into operation a school desegregation plan. The plan was a geographic zone plan with a transfer provision, although bias was

not recognized as a supporting reason for a transfer (8a). The faculty desegration plan became operational in 1959 (18a).

The petitioner, Board of Education of Louisville, Kentucky, exists pursuant to Kentucky Revised Statutes 160.160. It controls all public schools within the Louisville Independent School District. Louisville never provided any transportation for its students before *Brown I* and does not now. It operates 75 schools with all of its junior high schools and elementary schools having separate attendance zones and districts. Two of its high schools have district-wide attendance zones, three high schools have separate attendance zones, and three high schools share a common attendance zone (21a).

At the commencement of the 1972-1973 school year, its pupil population was 45,570, with 22,637 of total being white and 22,933 being black. At the commencement of the 1956-57 school year, 45,841 children were enrolled, with 12,010 being black and and 33,831 being white (11a).

The elected School Board is composed of three whites and two blacks, all of whom are elected at large from the Louisville Independent School District, a district in which white citizens outnumber black citizens three to one (11a).

The evidence in the District Court resulted in a finding that the Department of Health, Education and Welfare had determined that the Louisville Independent School District was a unitary school district (12a).

The evidence at the trial caused the Court to find that the tip ratio theory or the flight of the white theory had proven itself within the Louisville Independent School District and that further efforts by petitioner will

result in more segregation rather than desegregation (15a).

The District Court found that the original assignment plan was reasonable and that the transfer provision would not have resulted in more desegregation (16a).

The United States District Court found that the petitioners' school discontinuation policy was non-discriminatory and was designed to achieve maximum integration (17a).

The United States District Court found that the faculty and staff had been desegregated and that there were no vestiges of a dual school system based upon faculty or staff imbalance. (18a).

The United States District Court found that the Board's policy toward establishing attendance zones was non-discriminatory and designed to achieve maximum integration and was not established with any intent to maintain the operation of a dual school system(21a).

There was no claim nor was it found that there was any state action designed to impede desegration within the Louisville Independent School District (28a).

The respondents were and have been at all times material represented by Hon. Robert Sedler. In his opening statement to the District Court he said, "We are not contending here that schools are racially identifiable because of poor quality or because of substandard education. In Swann, the Court indicated that those factors would be taken into account. We are proceeding on the supposition that the quality of the Black schools is substantially the same as the quality of

the White schools and that the same kind of program is offered". (3a).

There was not one word of evidence offered or one bit of testimony adduced to the effect that petitioners did not immediately convert the school system to a unitary one or that they have not done all within their power since *Brown I* to maintain it as a unitary system. No claim of invidious discrimination was made. No bad motive was shown. No testimony was given from which an inference of any intent to thwart the holding of *Brown I* could be drawn. Respondents' entire case was bottomed upon the proposition that because the Board of Education of Louisville, Kentucky, was lawfully segregated at the time of the decision of *Brown I* and that because schools within its district were racially imbalanced that this equaled "vestiges of a dual school system."

After the trial in the District Court, the plaintiffs appealed the Judgment of the District Court to the United States Court of Appeals for the Sixth Circuit, and on December 28, 1973, the Sixth Circuit reversed the District Court and held that the Louisville Independent School District had not desegregated and that the boundary line between the Louisville District and the Jefferson County school district would present no barrier to a county-wide desegregation plan. *Newburg A. Coun., Inc.* v. *Board of Ed., Jefferson Cty., Ky.*, 489 F.2d 925 (CA 6, 1973).

Louisville and Jefferson County both petitioned this Court by certiorari and on July 25, 1974, this Court entered the following order:

"BD. OF EDUCATION OF JEFFERSON COUNTY, KY., ET AL. V. NEWBURG AREA COUNCIL, INC., ET AL., 73-1430; BD. OF EDUCATION OF LOUISVILLE, KY., ET AL. V. HAYCRAFT, ET AL., 73-1431; BD. OF EDUCATION OF ANCHORAGE, KY., ET AL., V. HAYCRAFT, ET AL., 73-1445.

The petitions for writs of certiorari are granted. The judgments are vacated and the cases are remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of Milliken vs. Bradley, ___ U.S. ___ (1974). Mr. Justice Douglas, Mr. Justice Brennan, Mr. Justice White and Mr. Justice Marshall would grant certiorari and without briefing or oral argument affirm the judgments."

## REASONS FOR GRANTING THE WRIT

**THE COURT SHOULD GRANT CERTIORARI TO DETERMINE THE SUBSTANTIAL QUESTION OF WHETHER A SCHOOL DISTRICT, LAWFULLY SEGREGATED AT THE TIME OF *BROWN I.* WHICH THEN CONVERTED TO A UNITARY SYSTEM, AND THEN BECAUSE OF FACTORS BEYOND ITS CONTROL AND WHICH IT WAS POWERLESS TO REMEDY BECAME RACIALLY IMBALANCED, IS GUILTY OF DE JURE SEGREGATION, WHERE THERE IS NO EVIDENCE OF ANY DISCRIMINATORY ACTION BY THE SCHOOL BOARD.**

After a protracted trial in the District Court, Judge Gordon found that Louisville had desegregated and had, since desegregation, operated a unitary school system. The trial court heard all of the witnesses and had the benefit of over 130 exhibits. Among other things, the Court observed:

"We cannot help but observe that, if every other school district in America had attacked the problem in such a straight forward and progressive manner, there might not now be the great plethora of federal decisions existing on the problem, with almost 700 school districts in America yet under federal court orders." (App. 31b)

and

"We have examined and viewed the evidence in this entire matter 'from its four corners.'

No one can seriously dispute that the Louisville Independent School District moved with dispatch and diligence to integrate its schools and faculty following *Brown I*, as evidenced by what in fact did occur, as hereinabove, factually found by us.

Likewise, no one can seriously dispute that during the ensuing years, particularly since 1965, regrettable racial imbalance did indeed begin its catena; however, such imbalance did not germinate from, nor has it proliferated from, any acts or failures to act by school or state authorities. The proliferation has been the result, in spite of efforts of resistance by the defendant Board, of white flight, neighborhood housing patterns and socioeconomic factors; not dejure acts of failures to act." (App. 57b)

The Court found (1) That Louisville had complied with the rules and regulations of all federal agencies, absent, Louisville could not have secured the large amount of federal funding for its programs, (App. 38b) and (2) That the tip ratio or flight of the white theory had proved out and was applicable to Louisville, and he acknowledged the position that complete desegregation

would result only if some or all of the Jefferson County District was made part of Louisville (App. 39b), (3) That the student assignment plan did *not* contribute to racial imbalance that existed in some of the Louisville schools (App. 40b), (4) That the Louisville school closing policy was non discriminatory and seemed to have been designed to achieve maximum integration (App. 41b), (5) That there was no vestige of a dual school system based upon the proposition of racial imbalance among the faculty (App. 42b), (6) That the attendance zones were established on a non discriminatory basis and not for purpose of invidious discrimination (App. 51b), and (7) There was no state action which contributed to the perpetration of a dual school system or impeded desegregation (App. 55b).

In Detroit, Page 21, it is said:

> "In *Swann*, which arose in the context of a single independent school district the court held:
>
> > 'If we were to read the holding of the District Court to require as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse.' 402 U.S., at 24.
>
> The clear import of this language from *Swann* is that desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each 'school, grade or classroom.'[19] See *Spencer* v. *Kugler*, 404 U.S. 1027 (1972)."
>
> "[19] Disparity in the racial composition of pupils within a single district may well constitute a 'signal'

> to a district court at the outset, leading to inquiry into the causes accounting for a pronounced racial identifiability of schools within one school system. In *Swann*, for example, we were dealing with a large but single independent school system and a unanimous Court noted: 'Where the proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race [the school authority has] the burden of showing that such school assignments are genuinely nondiscriminatory.' *Id.*, p. 26. See also *Keyes*, supra, 413 U.S. at 208. However, the use of significant racial imbalance in schools within an autonomous school district as a signal which operates simply to shift the burden of proof, is a very different matter from equating racial imbalance with a constitutional violation calling for a remedy. *Keyes, supra*, also involved a remedial order within a single autonomous school district."

Again, we say that imbalance, even significant imbalance, does not equal a constitutional violation calling for a remedy. Since Louisville desegregated, every school within the system, at one time or another, has had a black child in attendance, except one, and this proves conclusively and beyond cavil that there has been no discrimination since Louisville desegregated after the decision in *Brown I*. Exhibits 1 through 70 demonstrate the racial composition of every school within the Louisville System from 1956 through 1972. These exhibits show, for example, that Shawnee High School, a pre-Brown white school, had approximately 50 blacks and 850 whites in 1956, and the reverse is true in 1972. The same is true for Parkland. The exhibits men-

tioned are photographs of each school and on the back is shown the pupil ratio, the staff ratio, an assessment of the condition of the school and the per pupil cost of educating the children in the school. Without belaboring the point, we would show that Ahrens Trade High School, in 1956, had 1% black, and in 1972 30% black. (Exh. 61 and 61a). In 1956, Atherton had 0% black and in 1972 3% and in 1971 4% black (Exh. 62 and 62a). Regrettably, Central High School, from 1956 to 1972, has had only 2 white children. Its staff, however, went from 0% white in 1959 to 43% white in 1972 (Exh. 63 and 63a). Iroquois Senior High School opened in 1965 (not new construction) located in the south end of a predominantly white neighborhood started off with 2 black students in 1965 and 23 black students in 1967, and 16 black students in 1972 (Exh. 64 and 64a). Male High School went from 5% black in 1956 to 97% black in 1972. In 1965 47% of its students were black and in 1966 55% of its students were black. Its staff went from 0% black in 1959 to 41% black in 1972 (Exh. 65 and 65a). Manual Senior High School went from 2% black in 1956 to 37% black in 1972 (Exh. 66 and 66a). Shawnee Senior went from 5% black in 1956 to 95% black in 1972 (Exh. 67 and 67a). In 1965 4% of its pupils were black and in 1966 53% were black. Its staff went from 0% black in 1959 to 51% black in 1972.

Barrett Junior High School, located in the east end and in a predominantly white neighborhood went from 3% black in 1956 to 7% black in 1972 (Exh. 48 and 48a). DuValle Junior High School in the west end had 20 white children in 1959 and only 4 white children in 1972. Its staff in 1972 was composed of 16 whites and 26 blacks

(Exh. 49 and 49a). Gottschalk Junior High, located in the south end went from 1% black in 1956 to 3% black in 1972. 29 black children attended Gottschalk in 1972 (Exh. 50 and 50a). Highland Junior High School located in the east end, a pre-Brown white school went from 1% black in 1956 to 11% black in 1967 to 7% black in 1972. In 1969, 107 black students attended Highland (Exh. 51 and 51a). Manly Junior located in the central part of Louisville, came from 28% black in 1956 to 64% black in 1972. In 1965, there were 553 children in Manly and 502 black children. The staff ratio came from 4% black in 1959 to 49% black in 1972 (Exh. 52 and 52a). Manual Junior High School located in the central area of the city came from 14% black in 1956 to 44% black in 1972. Its student ratio thus fairly well matches the ratio of the district (Exh. 53 and 53a). Meyzeek Junior High School, located in the inner city, a pre-Brown black school had 24 whites and 391 blacks in 1966, and in 1972 had 1 white and 336 blacks. Its staff ratio came from 100% black down to 55% black in 1972 (13 whites and 16 blacks) (Exh. 54 and 54a). Parkland Junior High, a pre-Brown white school had 4% black in 1956, 46% black in 1963 and 98% black in 1972. 26 white children were attending Parkland in 1972 and its staff went from 0% black in 1959 to 48% black in 1972 (Exh. 55 and 55a). Russell Junior High, a pre-Brown black school has a very limited future because of its condition, has had 4 white children in it since 1956. Presently 15 of its staff members are white and 27 are black (Exh. 56 and 56a). Shawnee Junior High, a pre-Brown white school has run the course from 3% black in 1956 to 95% black in 1972. In 1964, 47% of the students were black and 53% white.

Its staff came from 0% black in 1959 to 56% black in 1972 (Exh. 57 and 57a). Southern Junior High has only had 19 black students in it since 1956. This school is located in the south end and in a predominantly white neighborhood (Exh. 58 and 58a). Western Junior High School, which is located in the west end, had 20% black in 1956 and 25% black in 1972. It is interesting to note that black population reduced from 233 in 1956 to 67 in 1960, and then increased to 319 in 1972. Its black staff came from 4% in 1959 to 32% in 1972 (Exh. 59 and 59a). Woerner Junior High School, located in the east end was opened in 1963 with 22% black population, which has increased to 41% in 1972. In 1972, 495 white students attended Woerner and 345 black children attended Woerner. Its staff came from 0% black in 1964 to 39% black in 1972 (Exh. 60 and 60a).

Atkinson Elementary, a pre-Brown white school had 5% black in 1956, 9% in 1969 and 7% in 1972 (Exh. 1 and 1a). Beechmont Elementary, a small south end school, has only had 3 blacks attending since 1956, that being 2 in 1971 and 1 in 1972. 31% of its faculty is black (Exh. 2 and 2a). Belknap Elementary, a pre-Brown white school located in the east end has had at least one black child in it since 1956, and as many as 8 in 1966 and 3 in 1972. 18% of the faculty is black. Belknap is located rather near Atherton High School (Exh. 3 and 3a). Bloom Elementary, a pre-Brown white school, located in the east end had a total of 19 black children in it since 1966 and 32% of its faculty is black (Exh. 4 and 4a). Brandeis Elementary , a pre-Brown white school, has come from 14% black in 1956 to 99% black in 1972, with 46% of its student population being black in 1960. Its faculty has

ranged from 0% black in 1959 to 55% black in 1968 to 63% black in 1972 (Exh. 5 and 5a). Breckinridge Elementary, opened in 1966, started off with 21% black and had 16% black in 1972, with 31% of its faculty being black in 1972 (Exh. 6 and 6a). Byck Elementary, opened in 1961, started off with 6% of its students being white and 94% being black, and it is now 98% black in 1972, however, 48% of its faculty was white in 1972 (Exh. 7 and 7a). Carmichael Elementary opened in 1961, with a student ratio being 50% black and 50% white and in 1972, was 84% black and 16% white. 47% of its faculty members are black (Exh. 8 and 8a). Carter Elementary located in the far west end of Louisville, a pre-Brown black school and located in a predominantly black neighborhood, had had a total of 67 white children attend since 1956 (Exh. 9 and 9a). Clark Elementary located in the east end of Louisville started in 1956 with 11% black and has 11% black in 1972 (Exh. 10 and 10a). Cochran Elementary, located at 2nd and Hill in the central part of the city near Manual, started in 1956 with 3% black, went to 10% black in 1968 and to 8% black in 1972 (Exh. 11 and 11a). Coleridge-Taylor Elementary located near Central High School, a pre-Brown black school started with 19 white children in 1956, went to 54 white children in 1965 to 6 white children in 1972. The ratio has ranged from 99% to 89% over the years. 55% of its faculty was black in 1972 (Exh. 12 and 12a). Dolfinger Elementary, a pre-Brown white school started with 8% black and in 1972 had 6% black and in 1967 had 13% black (Exh. 14 and 14a). Emerson Elementary, a pre-Brown white school, started with 4% black in 1956, went from 41% black in 1964 to 14% in 1972 (Exh. 15 and

15a). Englehard Elementary, a pre-Brown white school, went from 3% black in 1956 to 21% black in 1972 (Exh. 16 and 16a). Field Elementary located in the eastern-most part of Louisville and a predominantly white neighborhood has had a total of 17 black children attend from 1956 to 1972, has a black principal and 32% of its staff is black (Exh. 17 and 17a). Foster Elementary, a pre-Brown white school, started in 1956 with 13% black, went to 45% black in 1958 and only 2 white children attended in 1972. Its faculty is 40% white (Exh. 18 and 18a). Franklin Elementary, a pre-Brown white school started with 14% black and had 5% black in 1972 (Exh. 19 and 19a). Frayser Elementary, a pre-Brown white school, started with 4% black children in 1956 and 6% black children in 1972 (Exh. 20 and 20a). Hazelwood Elementary, a pre-Brown white school started out with 2% black in 1965 and now has 8% black (Exh. 21 and 21a). Heywood Elementary, a pre-Brown white school, started in 1965 with 17% black and now has 12% black (Exh. 22 and 22a). Jacob Elementary, a pre-Brown white school in the south end started at 0% black and went to 4% black in 1967 and now has 3% black (Exh. 23 and 23a). Johnston Elementary, a pre-Brown white school started with 8% black and now has 7% black (Exh. 24 and 24a). Jones Elementary, a pre-Brown white school, started with 9% black and went to 40% black in 1967 and now has 25% black (Exh. 25 and 25a). Kennedy Elementary, a west end black school opened in 1963, and has always had from 1 to 2% white children in attendance and 40% of its faculty is white (Exh. 26 and 26a). Martin Luther King, opened in 1968, had 22% white children and in 1972 only 2% were white, although 62% of its faculty is white (Exh. 27 and 27a). Lincoln

Elementary had 32% black in 1972 (Exh. 28 and 28a). Longfellow Elementary located in the east end of Louisville is the only school in the Louisville system who has never had a black child in attendance. 22% of its faculty is black (Exh. 29 and 29a). Lowell Elementary located in the south end of Louisville in what is known as the Highland Park area, a pre-Brown white school, started with 9% black in 1956 and in 1972 had 12% black (Exh. 30 and 30a). Marshall Elementary, an inner city school and a pre-Brown white school, started with 23% black in 1956 and had 53% in 1972 (Exh. 31 and 31a). McFerran Elementary, a pre-Brown white school started out with 0% black. It is now 88% black, however, in 1967, it had 564 white children and 408 black children (Exh. 32 and 32a). Parkland Elementary, a pre-Brown white school started with 18% black, was almost 50-50 in 1960 and had 3 white children in it in 1972 (Exh. 33 and 33a). Perry Elementary, a pre-Brown black school has only had 51 white children attend since 1956, although, in 1972 39% of its staff was white. (Exh. 34 and 34a). Portland Elementary has come from 1% black in 1956 to 8% black in 1972 (Exh. 35 and 35a). Roosevelt Elementary, a pre-Brown white school, went from 2% black in 1956 to 56% black in 1972 (Exh. 36 and 36a). Rutherford Elementary, a pre-Brown white school in the south end and in a predominantly white neighborhood, had 9 black children attending in 1972 (Exh. 37 and 37a). Semple Elementary, a pre-Brown white school in the south end and in a predominantly white neighborhood, has only had 15 black children attend since 1956 (Exh. 38 and 38a). Shawnee Elementary, a pre-Brown white school has come from 0% black in 1956 to 89% black in

1972, although in 1956, 621 whites attended and 430 blacks attended and in 1972, 50% of its faculty was white (Exh. 39 and 39a).

All of the foregoing is demonstrated by the exhibits. While this information may be onerous, its relevance is to demonstrate that all racial barriers in Louisville were and are eliminated. We see graphically the change of a school population of 0% black to 100% black, but we also see this matched identically with demographic exhibits which show where people lived during these years. If a neighborhood was 50% black and 50% white, the school was almost identically populated.

What we ask, could Louisville have done to prevent this? The student assignment plan as the evidence shows has made absolutely no difference insofar as the racial ratio of the schools is concerned. Its elimination would have only prohibited 4000 children from attending the school of their choice. Suppose the district was composed of 999 white children and 1 black child. Surely the one black child would be racially isolated, but could this district be considered to be a dual school system? Now, if this black child was required to go to school by himself and in a separate school only for him the answer would be undoubtedly yes; absent, however, this ridiculous fact situation, the answer would be no. This is what we believe this Court meant when it used the language it did in both Swann and Detroit. It is not, we contend, the number of black or white children or percentage of black or white children in a particular school, but whether or not there is any policy or concerted effort to prevent any child attending any school within the district because of race.

Thus, we contend it serves no purpose and is, in fact, somewhat misleading to use terms like "racially identifiable schools". A subjective test of how a school appears to a particular person cannot be determinative of the constitutional issues.

People have great mobility these days. Louisville has a strong open-housing law. We submit, however, there is no way that the Board of Education of Louisville, Kentucky can physically change the housing patterns which it did not create so as to achieve some reasonable mathematical ratio of black and white in a particular school.

Dr. Walker expressed some optimism about holding the situation in Louisville (Transcript of Evidence, Vol. II, pp. 161, 162, 163, and 164). The essence of his testimony was that because of the change in attitudes that the Louisville staff had been able to generate, it was more likely that lasting desegregation would result than from a cross-transportation situation in Louisville alone.

Thus, we contend that Judge Gordon's original opinion and judgment was correct. There was ample evidence to support his findings, and accordingly, his judgment should be reinstated.

According to the Supreme Court's opinion in *Milliken* v. *Bradley*, ___ U.S. ___, July 25, 1974, two things must exist before a Federal Court, in exercising its equitable remedial powers can order an interdistrict remedy. The first is that the boundary line between the two districts was established with a purpose of isolating black children from white children, or for some racial motive. The line separating the Louisville District and the Jefferson County District was established for no such purpose. No racial motives were present.

Chapter 160 of the Kentucky Revised Statutes provides:

> "Each county in this state constitutes a county school district, except that in counties in which there are independent school districts."

The statute establishing these boundary lines was adopted in 1934 (Chapter 56, Ky. Acts, 1934). This statute was construed by the Court of Appeals in *Thomas* v. *Spragens*, 308 Ky. 97, 213 S.W.2d 452 (1948). The significant holding in *Thomas*, however, was that the boundaries of an independent school district did not expand with the boundaries of the city by which it was embraced. Thus, the territorial limits of the Louisville Independent School District are less than the territorial limits of the City of Louisville.

The second requirement seems to be that Jefferson County must have done something to contribute to the racial imbalance within Louisville or either Louisville did something to cause the racial imbalance within the Jefferson County School District. Surely, and it cannot be denied, as Louisville's desegregation efforts escalated, white people did indeed move into the Jefferson County School district where there were practically no black children in residence or in attendance. We do not believe, however, that any black families moved into Louisville for a corresponding reason. Apparently, some black families have settled within the Jefferson County District, otherwise, it would not have almost 4000 black children attending its public schools. We do not believe that any argument to the effect that Jefferson County was a haven for white flight meets the test in *Milliken* or any legal test, because the same could be said about

three predominantly white districts directly across the river in Indiana, and people cannot be made to stay or leave. This is not a case where the state gerrymandered districts out of an existing district in order to isolate black children from white children, *Scotland Neck, supra.*

Plaintiffs seek some solace from the language in this Court's opinion that before *Brown I,* and because there was no black high school within the Jefferson County School District, black students were admitted to Louisville Central High School with the Jefferson County School District paying their tuition. This was pursuant to KRS 159.010, a statute that was in effect long before *Brown I* and had no relation to race. Often times where county areas outside an independent school district were sparsely settled, a county school district would pay the tuition for its children, both black and white, to attend school within the independent district because those schools were better and often times the county school district would lack similar facilities. Nevertheless, the Court covered this point under facts far more aggravated than presented here on pages 29 and 30 of its majority opinion. This was held insufficient to impose an inter-district remedy:

> "(2) There was evidence introduced at trial that, during the late 1950's, Carver School District, a predominantly Negro suburban district, contracted to have Negro high school students sent to a predominantly Negro school in Detroit. At the time, Carver was an independent school district that had no high school, because according to the trial evidence, 'Carver District . . . did not have a place for adequate high school facilities.' Pet. App., at

138a. Accordingly, arrangements were made with Northern High School in the abutting Detroit School District so that the Carver high school students could obtain a secondary school education. In 1960 the Oak Park School District, a predominantly White suburban district, annexed the predominantly Negro Carver School District, through the initiative of local officials, *Ibid.* There is, of course, no claim that the 1960 annexation had segregatory purpose or result or that Oak Park now maintains a dual system.

[19]According to the Court of Appeals, the arrangement during the late 1950's which allowed Carver students to be educated within the Detroit District was dependent upon the 'tacit or express' approval of the State Board of Education and was the result of the refusal of the White suburban districts to accept the Carver students. Although there is nothing in the record supporting the Court of Appeals supposition that suburban White schools refused to accept the Carver students, it appears that this situation, whether with or without the State's consent, may have had a segregatory effect on the school populations of the two districts involved. However, since 'the nature of the violation determines the scope of the remedy,' 402 U.S., at 15-16, this isolated instance affecting two of the school districts would not justify the broad metropolitan-wide remedy contemplated by the District Court and approved by the Court of Appeals, particularly since it embraced potentially 52 districts having no responsibility for the arrangement and involved 503,000 pupils in addition to Detroit's 276,000 students."

The situation in *Milliken* was far more aggravated because there were white schools available where the

black children could have attended and this was not true in the Louisville and Jefferson County situation.

If the facts of this case compel a holding, as we believe it does, that racial imbalance in Louisville schools cannot be eliminated, via an order directed to Louisville alone, then we must respectfully request that this Court reinstate the District Court's judgment which held that Louisville had done all it could do to desegregate and that further efforts would have a reverse effect.

Thereafter the case was rebriefed and reargued before the Sixth Circuit and on December 11, 1974, the Sixth Circuit reaffirmed its original position and remanded the case to the District Court for the forming of an implementation of a desegregation plan. The Sixth Circuit held that there was nothing in this Court's order, or in *Milliken* v. *Bradley* which would cause them to reconsider the issue of whether or not Louisville or Jefferson were operating a unitary or dual school system.

The raging issue at the time *Milliken* v. *Bradley* was decided and at the time Louisville and Jefferson petitioned this Court for certiorari originally was whether or not a United States District Court in the exercise of its equitable and remedial powers could cross school district boundary lines in establishing a plan for desegregation. Louisville, in its petition to the Court, did not question that power and does not question it now, although we think a District Court's power in this regard was severely limited by *Milliken* v. *Bradley*.

Louisville's position throughout this litigation has been:

(1) If Louisville is indeed segregated, then a desegregation order directed to Louisville alone would be counter-productive and result in more segregation because of white flight.

(2) That if a desegration order should result in this case, it should be imposed on a county-wide basis with the burden falling equally as possible and practicable on all.

We think it is extremely important and in accord with this Court's wishes that we advise that on February 28, 1975, the State Board of Education for the Commonwealth of Kentucky ordered, pursuant to Louisville's petition, that Louisville and Jefferson be MERGED into one school district with the effective legal date of such merger being April 1, 1975. The State Board ordered that three of the present five-members of the Louisville Board would serve on the merged Board during the early stages of merger. There is litigation pending presently in the Court of Appeals of Kentucky which will substantially bear on the merged Board's composition, and we expect a decision shortly from the Court of Appeals of Kentucky.

In the hearing on the merger question, the Board of Education of Jefferson County Kentucky objected to the merger order by the State Board and there is a real probability that the action of the State Board ordering merger may be attacked, in which event two possibilities may result. They are:

(1) That the order of the State Board of Education ordering merger would be set aside and held for naught; and,

(2) That the effective date of the merger would be substantially delayed.

Although none of this is in the record, we are stating it because we believe that an ethical duty exists on the part of Counsel to keep this Court advised of any developments which would bear on the merits of the case.

Again, it may be asked what are we about in filing this petition? First, we observe in *Milliken* v. *Bradley* that the Detroit school district did not seriously argue about the question of whether or not the Detroit district was in violation. The end result of *Milliken* v. *Bradley* imposed a desegregation order on Detroit alone which we must assert in all candor and because of white flight is doomed to failure before it starts. Second, we are aware of recent legislation enacted by Congress which would limit a District Court's power in ordering a desegregation plan to transporting children to the next nearest school. Because of the de facto racial isolation in Louisville, this simply will not work or do the job. Third, should the Board of Education of Jefferson County, Kentucky be successful in its appeal to the Court, or should its petition for certiorari be granted, had Louisville not acted, it would be in the same calamitous situation as Detroit.

Accordingly, we must, therefore, say to the Court that in the event it grants relief to Jefferson, then Louisville must have the same relief as Jefferson, and if it turns out that Jefferson is unitary, and if it turns out that the boundary lines are not eliminated because of the merger order, then Louisville must revert to its original status as found by the District Court, that being a unitary school district with the racial imbalance being a de facto and not de jure. We cannot over-emphasize or

adequately stress the critical importance of our position here. This necessitates our reviewing the original efficacy of the District Court's opinion and Judgment (1a).

## CONCLUSION

This brief on the part of Louisville represents no retreat from its long held position that a forced separation of the races and the fundamental priciples of democracy cannot co-exist. It is obvious from the record in this case, as it must be in any record involving an urban school system, that the racial isolation that may exist results from economics rather than de jure acts of discrimination on the part of school authorities. This is particularly true in the case here. The militant question now, as it has always been, is whether or not a Federal Court in the exercise of its equitable remedial powers, keeping in mind that a Federal Court is a court of limited jurisdiction, can restructure state-created political institutions in order to alleviate or correct a social ill.

This Court and "experienced observers and colunists" have said that Detroit does not mean a retreat from *Brown I*. Regrettably, we have a contrary opinion. The end result of Detroit whereby this Court urged expediency in fashioning a remedy for Detroit alone is unassailable proof of the dissipation of *Brown I*. Nevertheless, we are all taught that what the Court says in a given case is the law of the land.

It has been said that the causes of inner city problems and the reasons for poverty-stricken blacks living in inner cities are simply not known. Again, we

disagree. The reasons are again apparent. Poverty is the cause. Educational experts say with a high degree of credibility that achievement in school is directly related and parallel to the economic status of the family from which the child comes. This is as true in Louisille as it is in other poverty-stricken inner city school system. There is a cultural lag and a lack of motivation from a poverty-stricken family. Of course, there are exceptions, but the exceptions prove the rule. Thus, poor people, the majority of whom are black, are locked in not from discriminatory acts on the part of the school authorities, but because of their economic level. A desegregation remedy toward Louisville alone will not cure this situation but in our opinion would aggravate it. Perhaps it should be a constitutional right not to be poor but we do not know of one. Open housing laws sound good, but even those laws, and Louisville has one of the strongest, have not resulted in a hegira of blacks from the inner city to the suburbs. Again, poverty is the reason.

The point of all this and maybe the point of Detroit is that a school desegregation remedy cannot constitutionally be employed to remedy the evils of society not amounting to a constitutional violation.

Louisville, through a progressive board led by an innovative superintendent has attacked the problem. Significantly and almost miraculously Louisville's elementary poverty level children in the lower grades are now reading on the national level. Its staff attitudes and blitz programs have resulted in fewer drop-outs and fewer delinquency referrals. It is not claimed that these programs and these achievements are going to correct problems of racial isolation and poverty, but changes are occurring and these changes are good.

The Louisville School Board has adopted a program and policy of sharing its decision-making power with neighborhood school boards meaning that over 50 of Louisville's schools have a separate board for each school composed of patrons and educators from the school. These boards participate in staff selection, programs and even are allowed input as to how the money allocated to a particular school should be spent. This has not resulted in any derogation of the elected board's powers. Quite to the contrary these boards have been viable and their decisions responsible. Much of the hostility that people previously held toward a particular school has been eliminated.

Because we believe Detroit has emasculated any possibility of an interdistrict solution or forced merger here by a Federal Court, Louisville again must request this Court to (1) Hold it to be a unitary district and reinstate Judge Gordon's opinion and judgment of March 8, 1973 and (2) If there is a disagreement about this, then an interdistrict remedy or countywide remedy must be ordered.

Respectfully submitted,

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